



Santa Clara Law Review

Volume 41 | Number 4

Article 9

1-1-2001

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Recommended Citation

Alex Ward, Comment, *Breaking the Sovereignty Barrier: The United States and the International Criminal Court*, 41 SANTA CLARA L. REV. 1123 (2001).

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BREAKING THE SOVEREIGNTY BARRIER: THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT

Alex Ward*

I. INTRODUCTION

In July 1998, representatives of 148 countries gathered in Rome to draft a statute (Rome Statute) for the International Criminal Court (ICC).¹ The Court had long existed on the wish-list of the United Nations, but considerable disagreement had always dismantled any attempts for its realization.² Finally, after five years of intense negotiation, the global community approached the establishment of a judicial body with the ability to prosecute criminals for the gravest breaches of international law.

The United States traditionally supported the principles underlying the ICC,³ and it had expressed its support publicly for the Court on many occasions.⁴ Surprisingly, by the end of the conference the United States found itself in the company of a small group of renegade states rejecting the statute,⁵

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1. See *Permanent War Crimes Court Approved*, AP Online, July 18, 1998, available in 1998 WL 6696642.

2. See Gerard E. O'Connor, *The Pursuit of Justice and Accountability: Why the United States Should Support the Establishment of an International Criminal Court*, 27 HOFSTRA L. REV. 927, 948 (1999) (pointing to the failure of the international community to seize the momentum created by the Tribunals).

3. See Bartram S. Brown, *U.S. Objections to the Statute of the International Criminal Court: A Brief Response*, 31 N.Y.U. J. INT'L L. & POL. 855 (1999).

4. See Kenneth Roth, *The Court the U.S. Doesn't Want*, N.Y. REV. BOOKS, Nov. 19, 1998, at 45.

5. See Jim Lobe, *Rights-U.S.: Republicans Urge Clinton to Oppose ICC*, INTER PRESS SERV., July 23, 1998, available in 1998 WL 5988429. Virtually all of Washington's traditional European and East Asian allies voted for the treaty, while China, Iraq, Israel, Libya, Qatar, and Yemen voted against it. See *id.*

while its closest military and political allies joined the vast majority of nations in signing the instrument.⁶ The United States denounced the statute as fundamentally flawed, contrary to international law, and a serious infringement on its ability to maintain peace and security around the world.⁷ Therefore it came as a surprise when on December 31, 2000, President Bill Clinton reversed his policy and hesitantly agreed to sign the treaty, thus handing the issue to the Senate and a new administration.

This comment seeks to determine whether the United States acts in its best interest in accepting the statute of the ICC or conversely in opposing the establishment of the Court. Part II examines the ancestry of the ICC,⁸ the role of the United States in its development,⁹ and the legal issues that shaped the debate at the Rome conference.¹⁰ In Part IV the focus turns to an analysis of the legal arguments made by the United States against the Court.¹¹ Finally, Part V concludes with a proposal¹² advocating that the United States supports the statute and then briefly considers prospects for ratification.

II. BACKGROUND

The first attempt to create an international criminal court within the context of the United Nations occurred in 1954.¹³ The fact that almost fifty years passed before the historic vote in Rome can be looked at in two ways. On the one hand, it evidences the disagreement that plagued the development of the Court over the years.¹⁴ A more revealing angle, however, views the passage of the Rome Statute as

6. See *id.*

7. See generally *Hearings on the Establishment of a Permanent International Criminal Court Before the Senate Comm. on Foreign Relations*, 105th Cong. (July 23, 1998) [hereinafter *ICC Hearings*] (statement of David J. Scheffer, Ambassador-at-Large for War Crimes Issues and Head of the U.S. Delegation to the U.N. Diplomatic Conference on the Establishment of a Permanent International Criminal Court), transcript available in 1998 WL 12762512; see also discussion *infra* Part II.D.

8. See discussion *infra* Part II.A.

9. See discussion *infra* Part II.C.

10. See discussion *infra* Part II.C-D.

11. See discussion *infra* Part IV.

12. See discussion *infra* Part V.

13. See 3 M. CHERIF BASSIOUNI, *INTERNATIONAL CRIMINAL LAW: ENFORCEMENT* 7-8 (M. Cherif Bassiouni ed., 1987).

14. See O'Connor, *supra* note 2.

astonishing, considering the relative youth of the international legal system. Indeed, not until 1945 were individuals accepted as subjects of international law.¹⁵

A. *History of International Tribunals*

Prior to World War II only domestic jurisdictions could try individuals for war crimes.¹⁶ Although the League of Nations had drafted proposals for an international tribunal, only one country ratified the plan before efforts stalled in the face of political problems and the commencement of World War II.¹⁷ In light of the atrocities committed by the Nazis, the Allies quickly responded to renewed interest in an international criminal tribunal.¹⁸ On August 8, 1945, the Allies formed the International Military Tribunal for the prosecution of major war criminals in Nuremberg,¹⁹ and in 1946 a similar body, the International Military Tribunal for the Far East, was established in Tokyo.²⁰

Despite some controversy over the inherent fairness of a tribunal established by the victors of the war,²¹ a general consensus exists that these courts laid down important precedents for international law.²² First, the tribunals recognized that individuals could be held accountable for violating duties imposed by customary international law.²³ This marked a shift from the traditional belief that only states, as the primary actors in the international community, could be the subjects of customary norms.²⁴ While the subject

15. See Henry T. King & Theodore C. Theofrastous, *From Nuremberg to Rome: A Step Backward for U.S. Foreign Policy*, 31 CASE W. RES. J. INT'L L. 47, 52 (1999). However, international law following Nuremberg witnessed a change in thinking regarding the rights, obligations, and duties of the individual and the state in the international context. See *id.*

16. See *id.*

17. See BASSIOUNI, *supra* note 13, at 9.

18. See O'Connor, *supra* note 2, at 939-40.

19. See *id.* at 940.

20. See *id.* at 940-41.

21. See *id.* at 941. But see King & Theofrastous, *supra* note 15, at 53 (suggesting that the actions of the United States at Nuremberg transcended mere victor's justice).

22. See King & Theofrastous, *supra* note 15, at 53-54; O'Connor, *supra* note 2, at 943-44 (noting the Nuremberg principles have become general principles of international law).

23. See BASSIOUNI, *supra* note 13, at 6 (noting that the basic form of accountability was that of individual responsibility); O'Connor, *supra* note 2, at 941-42.

24. See King & Theofrastous, *supra* note 15, at 52 ("During pre-Nuremberg,

matter of the tribunals was well-founded, this extension of liability to individuals constituted a dramatic step.²⁵ Furthermore, Articles VII and VIII of the Nuremberg charter specifically rejected defenses based on state sovereignty which domestic courts had used in the trials following World War I.²⁶ This opened up the possibility of prosecuting leaders who claimed immunity under the acts of state doctrine, as well as lower officials who claimed defenses based upon superior orders.²⁷

The widespread popularity of these principles resulted in their codification both in a U.N. General Assembly resolution²⁸ and by the International Law Commission (ILC).²⁹ Additionally, the tribunals served as a strong symbol of the possibilities for an international court with universal jurisdiction.³⁰ However, the development of the Cold War ultimately stymied the momentum that followed Nuremberg,³¹ and almost fifty years would pass before another attempt to create an international court was made.³²

Between 1945 and 1993 hundreds of events occurred that might have justified the establishment of another ad hoc tribunal, but serious efforts did not commence until the humanitarian crisis in Yugoslavia.³³ On May 25, 1993, the U.N. Security Council used its Article VII powers to establish the International Criminal Tribunal for the former Yugoslavia (ICTY).³⁴ This tribunal, seated in The Hague, has been praised not only for its unbiased and international character, but also for its fairly reputable record of obtaining custody of defendants.³⁵ Of the ninety-eight persons indicted

the basic tenets of international law pertained only to states, as individuals were not the proper subjects of international law.”).

25. See O'Connor, *supra* note 2, at 942 (characterizing the tribunals as an important advancement in the area of international law).

26. See BASSIOUNI, *supra* note 13, at 6.

27. See *id.*

28. See *id.* at 7.

29. See *id.*

30. See O'Connor, *supra* note 2, at 943-44.

31. See *id.* at 944.

32. This attempt resulted in the International Criminal Tribunal for the former Yugoslavia (ICTY). See *infra* notes 34-36 and accompanying text.

33. See King & Theofrastous, *supra* note 15, at 68 (citing genocidal acts by the Japanese, Russians, and Cambodians, as well as massive fatalities in Uganda, Indonesia, East Timor, El Salvador, and Argentina).

34. See O'Connor, *supra* note 2, at 945.

35. See *id.* at 947-48.

by the court, it currently has thirty-nine in criminal proceedings and has dropped charges against eighteen, leaving twenty-seven accuseds still at large.³⁶

The following year, the Security Council formed the International Criminal Tribunal for Rwanda (ICTR) to deal with the humanitarian crisis left behind by years of brutal tribal conflict.³⁷ Like the ICTY, the charter of the Rwanda Tribunal contains some language nearly identical to the Nuremberg document concerning the accountability of individuals.³⁸ The Tribunal has rendered only eight convictions as of the date of this comment, but has over forty individuals currently in custody.³⁹

Jurisdiction of the ICTY and ICTR is based upon universality as conferred by the Security Council.⁴⁰ Both courts hold primacy over the domestic laws of their relative geographic locations as well as over the governments of those individuals involved with peacekeeping efforts.⁴¹

The United States had an influential role in all four tribunals, both as a member of the victorious alliance that established the courts in Nuremberg and Tokyo⁴² and as a member of the Security Council that established the bodies in Yugoslavia and Rwanda.⁴³ The United States had also furnished financial and technical support to the two latest tribunals⁴⁴ and has several prosecutors and judges involved in

36. See *ICTY Key Figures* (last modified Apr. 18, 2001) <<http://www.un.org/icty/glance/keyfig-e.htm>>. The remainder of indictees are comprised of those who have been convicted, acquitted, or have died before the commencement of proceedings. See *id.*

37. See O'Connor, *supra* note 2, at 946-47.

38. See Marcella David, *Grotius Repudiate: The American Objections to the International Criminal Court and the Commitment to International Law*, 20 MICH. J. INT'L L. 337, 348 (referring to the courts as the progeny of Nuremberg).

39. See ICTR, *Detention of Suspects and Imprisonment of Convicted Persons* (Feb. 2001) <<http://www.ictor.org/ENGLISH/factsheets/7.htm>>.

40. See *ICTY Key Figures*, *supra* note 36; see also ICTR, *supra* note 39.

41. See *Burden of Proof: Millennium 2001: Would an International Criminal Court Help or Hinder Pursuit of Global Justice?* (CNN television broadcast, Jan. 2, 2000) [hereinafter *Burden of Proof*] (statements made by David J. Scheffer admitting the primacy of the Tribunal's jurisdiction), transcript available at <<http://cnn.com/TRANSCRIPTS/0001/02/bp.00.html>>.

42. See *supra* text accompanying notes 19-20.

43. See *supra* text accompanying notes 34, 37.

44. See David J. Scheffer, *The International Criminal Court*, Remarks before the 6th Comm. of the 53d General Assembly, U.S. Department of State (Oct. 21, 1998), transcript available at <http://www.state.gov/www/policy_remarks/1998/981021_scheffer_icc.html>.

their operation.⁴⁵ This would seem to suggest that the United States tacitly supported the founding principles of the courts.

B. *Why an International Court?*

Serious interest in the establishment of an international criminal court revived in the late 1980s.⁴⁶ This is partly due to the easing of Cold War tensions that had rendered the United Nations divided and ineffective for many years.⁴⁷ The speed with which the Court developed reflected the inherent limitations from which the status quo solutions to international crime suffered. Domestic prosecution of international crimes could occur, but in reality most incidents occurred within the territorial boundaries of states.⁴⁸ The government of the state, often the perpetrator, would never bring criminals to justice.⁴⁹ Under the international principle of universal jurisdiction, other states could prosecute an accused, although few had the political will,⁵⁰ and apprehending potential criminals remained a remote possibility.⁵¹

Additionally, the prominent international solution, the ad hoc tribunals, proved inadequate for many reasons. First, the establishment of a tribunal was subject to political consideration since it had come from the Security Council of the United Nations.⁵² Despite the formation of the Yugoslav and Rwandan courts, the Council exhibited a very poor record.⁵³ States demanded a solution that would not involve inconsistency of implementation.⁵⁴ Second, the tribunal system was woefully inefficient. Critics viewed both the ICTY and ICTR as virtual afterthoughts in that they had been

45. See generally *ICTY Key Figures*, *supra* note 36; see also *ICTR*, *supra* note 39 (listing the names and nationalities of the court officials).

46. See David, *supra* note 38, at 353.

47. See *id.*

48. See King & Theofrastous, *supra* note 15, at 64 (citing the non-existence of mechanisms to apprehend criminals).

49. See *id.* (referring to states which prefer anarchical systems of law).

50. See *id.*

51. See *id.*

52. See David, *supra* note 38, at 350.

53. See *id.* at 351 ("The judicious use of the veto power held by the permanent members has prevented the U.N. from effectively responding . . .").

54. See *Burden of Proof*, *supra* note 41 (quoting statements made by Gabrielle Kirk McDonald that the ICC is needed to head-off international crime before it begins).

established following years of violence and bloodshed.⁵⁵ The gap in time between the formation of the ad hoc courts and the arduous process of physically establishing the tribunal constituted areas of serious concern, for it allowed violence to continue and gave suspects the chance to flee the area.⁵⁶ Lastly, the tribunals proved economically inefficient because of their need to procure facilities, staffing, and supplies in the pertinent region.⁵⁷

C. *Developments Preceding the Rome Conference*

In 1989, the General Assembly passed a resolution authorizing the ILC to study the possibility of an international criminal court.⁵⁸ After a favorable report from a commission, the Assembly asked the ILC to begin drafting a statute in 1992.⁵⁹ In 1995, the General Assembly established a preparatory committee (Prepcom) to help form a consolidated text for review.⁶⁰ Leading up to the Rome Conference, the committee held six preparatory conferences that involved both national representatives and non-governmental organizations.⁶¹

During this time the United States seemed to overtly bolster establishment efforts.⁶² President Clinton had made supportive remarks on several occasions,⁶³ and Congress had also expressed its approval of Prepcom's work.⁶⁴ Perhaps the firmest evidence of the seriousness with which the United States approached the issue came in 1997 with the appointment of Professor David Scheffer to the newly-created position of "Ambassador to War Crimes."⁶⁵ From the start,

55. *See id.*

56. *See id.*

57. *See King & Theofrastous, supra* note 15, at 65.

58. *See Brown, supra* note 3, at 857-58.

59. *See id.*

60. *See id.* at 858.

61. *See id.*

62. *See James P. Rubin, U.S. Department of State: Office of the Spokesman Press Statement* (Apr. 2, 1998) <<http://secretary.state.gov/www/briefings/statements/1998/ps980402.html>> (reaffirming the president's continued commitment to the Court); *James B. Foley, U.S. Department of State: Office of the Spokesman Press Statement* (June 12, 1998) <<http://secretary.state.gov/www/briefings/statements/1998/ps980612a.html>>.

63. *See Roth, supra* note 4 (observing that President Clinton had repeatedly endorsed the Court).

64. *See King & Theofrastous, supra* note 15, at 77.

65. *See Lawyer Sam's War*, *THE ECONOMIST*, Apr. 24, 1999, available in

Scheffer, who headed the American delegation in Rome, favored signing the ICC document,⁶⁶ but his misgivings coupled with the directives of hard-line leaders in Washington left him with little room to maneuver on the key issues of contention.⁶⁷

Thus, in the months leading up to the Rome Conference, the United States appeared to send mixed messages. In February, Scheffer expressed his and the President's commitment to the Court, but he also identified the substantive and national interest concerns that most preoccupied the delegation.⁶⁸ First, Scheffer characterized the ICC as a safety net which must buttress national prosecution of international crimes.⁶⁹ Unlike the criminal tribunals in Yugoslavia and Rwanda,⁷⁰ the United States sought to base the ICC on the principle of complementarity, which would allow states the first option of investigating and prosecuting international crimes committed by their citizens.⁷¹ This emphasis on sovereignty set the overall tone for the American approach.

Second, the United States foresaw the U.N. Security Council as the key player in the operation of the Court.⁷² Scheffer believed that the Court should respect the jurisdiction of the Council to address issues under its Article VII power.⁷³ Additionally, Scheffer argued that the Council should refer cases directly to the Court as well as function as the primary enforcement mechanism.⁷⁴

Third, the United States cautiously regarded state consent to jurisdiction.⁷⁵ Although he only glanced over the

1999 WL 7362645.

66. *See id.*

67. *See* King & Theofrastous, *supra* note 15, at 79. In retrospect, an important element of the U.S. position in Rome was apparently framed by influential members of the Senate Foreign Relations Committee. *See id.*

68. *See* David J. Scheffer, An International Criminal Court: The Challenge of Enforcing International Humanitarian Law, Address Before the Southern California Working Group on the International Criminal Court (Feb. 26, 1998), transcript available at <http://www.state.gov/www/policy_remarks/1998/980226_scheffer_hum_law.html>.

69. *See id.*

70. *See* ICTY Key Figures, *supra* note 36; *see also* ICTR, *supra* note 39.

71. *See* Scheffer, *supra* note 68.

72. *See id.*

73. *See id.*

74. *See id.*

75. *See id.*

issue, Scheffer implied that the power of the Security Council and the strength of the complementarity principle would effect the American stance on this point.⁷⁶

Fourth, addressing the fear that the United States would open itself to frivolous political attacks, Scheffer sought to limit the power of the Court's prosecutor to independently commence investigations.⁷⁷ The United States delegation clearly favored a proposal that would limit the prosecutor to cases referred by the Security Council or by the state party of which the accused was a national.⁷⁸

Lastly, various other substantive and procedural issues existed that posed problems, the most pressing of which were the definitions of crimes and the procedures for amendment of the treaty.⁷⁹

Scheffer maintained rigid legal positions, despite the overall conciliatory tone of the State Department and the president.⁸⁰ Meanwhile, Senator Jesse Helms, a pivotal actor in the Senate, began to wage an all-out offensive against the Court. Helms had two principle fears: first, denouncing any surrender of national sovereignty to the United Nations by the United States,⁸¹ and second, rejecting any court that would have jurisdiction of American citizens over the express objections of the United States.⁸² Helms declared that any treaty without a "clear U.S. veto . . . will be dead-on-arrival at the Senate Foreign Relations Committee,"⁸³ and that "[t]hose negotiators do not have any 'flexibility' [on the issue]."⁸⁴

A final element concerning the delegation's agenda emerged shortly before the Conference began. The State Department, while continuing to profess its support for the Court, made a deviation from its more formalistic arguments to emphasize the impact that the ICC might have upon the

76. *See id.* (claiming the need to maintain reservation on the issue and continue examining the statute further).

77. *See Scheffer, supra* note 68.

78. *See id.*

79. These issues included dispute resolution, amendments, withdrawal rights, and funding. *See id.*

80. *See Rubin, supra* note 62.

81. *See Jesse Helms, Helms Declares U.N. Criminal Court "Dead-On-Arrival" in Senate Without U.S. Veto*, Mar. 26, 1998, available in 1998 WL 7322525.

82. *See id.*

83. *Id.*

84. *Id.*

foreign policy of the United States.⁸⁵ Scheffer's statement that the "creation of the Court will not take place in a vacuum"⁸⁶ sent two simultaneous messages. First, it reminded the world of the significant contributions the United States made to world peace and security. Second, it sent a message to foreign negotiators who might weaken American interests by pushing idealistic and impractical proposals.

D. *Legal Hurdles at the Rome Convention*

Due to the competing imperatives with which the U.S. delegation entered the Rome Conference, the eventual outcome was perhaps not surprising. Commentators characterized the American strategy as disjointed and inefficient.⁸⁷ This incoherent approach manifested itself into three broad categories: contributions that strengthened the statute, those that weakened that statute, and the irreconcilable points of contention upon which the United States rejected the statute.

The U.S. delegation was at its best when it attempted to infuse the rigid concepts of its legal system into the Court. First, the United States succeeded in strengthening the definitions of crimes, so that the definition of "crimes against humanity" would apply to domestic human rights issues.⁸⁸ Second, the delegation stressed the inclusion of American constitutional protections such as the presumption of innocence and due process rights to protect the accused.⁸⁹ Third, the United States strengthened the integrity of the Court by calling for the inclusion of rules of procedure and evidence.⁹⁰ Lastly, the U.S. delegation advocated for the inclusion of the principle of complementarity into the statute.⁹¹ This gave national governments the ability to avert any prosecution as long as they had the structural capability to investigate the matter and conduct a legitimate inquiry.⁹²

Other contributions by the delegation ultimately

85. See Rubin, *supra* note 62.

86. Foley, *supra* note 62.

87. See Brown, *supra* note 3, at 856-57.

88. See O'Connor, *supra* note 2, at 948.

89. See Scheffer, *supra* note 7.

90. See *id.*

91. See *id.*

92. See Brown, *supra* note 3, at 878.

weakened the Court by limiting its sovereign power. Two issues in particular stood out. First, on the definition of war crimes, the United States feared that a conflict might arise between what the ICC and the U.S. military considered a lawful use of force.⁹³ In particular, the rule of proportionality in international law dictates that damage inflicted by military attack may not be excessive relative to the strike's objective.⁹⁴ For a country like the United States, which relies so heavily on bombing to achieve political objectives around the world, this constituted a major concern. In the end, the American delegation succeeded in re-writing the proportionality rule to only come into effect when civilian casualties are "clearly excessive" in relation to military advantage.⁹⁵ This language increases the likelihood that cases based on proportionality will be difficult to raise under the ICC.⁹⁶ The delegation also weakened the Court in the area of jurisdiction.

Although the United States disfavored many aspects of the Court, three points in particular proved to be the primary basis for rejection of the statute at the Rome Conference. All three, not coincidentally, have profound implications on the United States's ability to escape the jurisdiction of the ICC.

First, the ICC jurisdiction covered only the most serious of international crimes: genocide,⁹⁷ crimes against humanity,⁹⁸ war crimes,⁹⁹ and crimes of aggression.¹⁰⁰ Although the first three are well-grounded in international law,¹⁰¹ consensus has never existed on the definition of "aggression."¹⁰² The United States believed that the Security Council should preside over crimes of aggression, as specified in Article 39 of the United

93. See Roth, *supra* note 4.

94. See *id.*

95. See *id.*

96. See *id.* The effect of this and other concessions to the United States, including a broader definition of military advantage, was to tip the balance considerably against the ICC finding a violation of the rule of proportionality. See *id.*

97. See Rome Statute of the International Criminal Court, art. 6, U.N. Doc. A/CONF.183/9 (1998) [hereinafter Rome Statute].

98. See *id.* art. 7.

99. See *id.* art. 8.

100. See *id.* art. 5, para. 2.

101. See Brown, *supra* note 3, at 865.

102. See *id.* at 868 ("The definition of aggression has long been a contentious issue in international relations.").

Nations charter.¹⁰³ However, the final draft of the ICC statute contains the crime of aggression as a term that will come into effect at a later date.¹⁰⁴ Because signatory states can amend the treaty by a two-thirds vote,¹⁰⁵ the United States feared that it would be unable to control the potentially detrimental definition.¹⁰⁶ Additionally, it saw the inclusion of the term as taking power away from the Security Council, where it enjoys permanent member status.¹⁰⁷

The second point of contention concerned the power of the ICC prosecutor. Negotiators struggled over the prosecutor's ability to independently begin investigations free of oversight.¹⁰⁸ The American delegation pushed for investigation only on referral by the Security Council or a state party.¹⁰⁹ This would ensure their ability to completely control the scope of the Court when investigating or prosecuting American citizens.¹¹⁰ Negotiators introduced two compromise positions. The first established a three-judge oversight committee to review all investigations by the prosecutor.¹¹¹ The second compromise gave special power given to the Security Council that enabled it to delay an investigation for up to a year, provided that it received a majority vote of the entire Council.¹¹² At the end of the year the Council would reconsider the vote and conceivably move to table the issue again.¹¹³ These proposals, though deemed satisfactory by several close allies, did not satisfy the U.S. delegation.¹¹⁴

The final and most important issue for the delegation was whether the Court had jurisdiction of non-party states stemming from Article 12 of the statute.¹¹⁵ At one extreme, some nations supported a manner of universal jurisdiction for

103. The Charter of the United Nations gives the Security Council the authority to determine the existence of an act of aggression. *See id.* at 867.

104. *See Rome Statute, supra* note 97.

105. *See David, supra* note 38, at 355.

106. *See O'Connor, supra* note 2, at 956-97.

107. *See Roth, supra* note 4.

108. *See id.*

109. *See ICC Hearings, supra* note 7.

110. *See Roth, supra* note 4.

111. *See id.* (referring to this as the Argentine-German proposal).

112. *See O'Connor, supra* note 2, at 965.

113. *See Rome Statute, supra* note 97, art. 16.

114. *See David, supra* note 38, at 355-56.

115. *See Roth, supra* note 4 (referring to it as the "most divisive issue delegates faced").

the Court covering all states regardless of their ratification status.¹¹⁶ They reasoned that because states could already prosecute individuals for these international crimes, universal jurisdiction was appropriate.¹¹⁷ The United States, however, pointed out that creating international obligations for a state not a party to a treaty ran counter to fundamental principles of international law.¹¹⁸ Furthermore, the United States argued that from a practical standpoint, the process of signing and then ratifying the statute could take years or might never happen at all.¹¹⁹ A compromise proposal materialized that would only grant the ICC jurisdiction if one of four governments involved had ratified the statute: the government of accused, the government of the victim, the government where the crime occurred, or the government that apprehended the accused.¹²⁰

The United States took a hard-line stance on the issue and demanded that the Court have jurisdiction only if the government of the accused had consented through ratification.¹²¹ Because this would allow the United States to shield itself from jurisdiction by not ratifying the statute, any investigation of a U.S. citizen would have to pass through the Security Council, a remote prospect at best.¹²² In hopes of appeasing the United States, negotiators proposed another compromise which would grant the Court jurisdiction if either the government of the accused or the government of the country where the crime had been committed consented.¹²³ This compromise, though proposed with good intentions, appeared to backfire on the negotiators.¹²⁴ The United States departed the conference without signing the treaty, leaving the Court with significantly weaker jurisdiction than it

116. *See id.* (asserting that this was the German position).

117. *See id.*

118. *See ICC Hearings, supra* note 7 (statement of David J. Scheffer).

119. *See* David J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT'L L. 12 (1999).

120. *See* Roth, *supra* note 4. The South Korean delegation offered this proposal.

121. *See id.*; *see also ICC Hearings, supra* note 7. A subsequent counter-proposal would have bound the referring party to investigation by the Court, but this was also seen as too limiting.

122. *See* Roth, *supra* note 4.

123. *See id.*

124. *See id.*

conceivably should have retained.¹²⁵

Finally, the U.S. delegation took exception to the concurrent issue of opting out of the Court's jurisdiction.¹²⁶ The United States had originally proposed a ten-year opt-out provision for war crimes to allow it to assess the effect of the Court upon its foreign affairs.¹²⁷ Instead, the finalized statute contained a seven-year opt-out provision available only to states that ratified the treaty.¹²⁸ This twist acted as an incentive for states to sign onto the treaty now rather than later.¹²⁹ Coupled with the impending loss on the issue of Article 12, however, the United States denounced the provision.¹³⁰ It argued that a state that committed war crimes could opt-out of the Court's jurisdiction for seven years but at the same time a non-party could come under the Court's jurisdiction under Article 12.¹³¹

Two days before the final vote, Ambassador Scheffer issued a statement announcing the extreme likelihood that the United States would vote against the statute.¹³² In light of the many efforts the United States had made to protect itself from the jurisdiction of the Court, many questioned the sincerity of American efforts to establish the Court.¹³³

E. *Political Hurdles at the Rome Conference*

The crux of the dilemma for the delegation at Rome was that it accepted the ICC in principle, but as Senator Helms commanded, it refused to budge on the issue of sovereignty.¹³⁴ Although negotiators implemented safeguards to lessen the prospects of U.S. forces coming into the reach of the Court,

125. See *id.* (referring to the concessions as "the worst of both worlds").

126. See *ICC Hearings*, *supra* note 7.

127. See *id.*

128. See Brown, *supra* note 3, at 886-87.

129. See Roth, *supra* note 4 (suggesting that this provision was ingenious).

130. See *ICC Hearings*, *supra* note 7.

131. See *id.*

132. See David J. Scheffer, Status of Negotiations on the Establishment of an International Criminal Court, Statement Before the U.N. Diplomatic Conference on the Establishment of an International Criminal Court (July 15, 1998) transcript available at <http://www.state.gov/www/policy_remarks/1998/980715_scheffer_icc.html>.

133. See Diane F. Orentlicher, *U.S. Cheats Justice in Opposing World Order*, L.A. TIMES, Aug. 30, 1998, available in 1998 WL 2459221 (stating that the United States has already gone a long way to alienate its closest allies).

134. See *A World Court for Criminals*, THE ECONOMIST, Oct. 9, 1999, available in 1999 WL 7364825.

American delegates feared the worst-case scenario. For example, the statute integrated the principle of complementarity, a major tenet of the American agenda, and further strengthened it with the oversight of a judicial panel to decrease the threat of politically motivated claims.¹³⁵ In the event this body sustained a referral, a state could appeal the decision as well.¹³⁶ However, the delegation would accept nothing short of the extreme of an outright veto.¹³⁷

Furthermore, the Americans seemed to resent anyone who questioned its sovereign decisions on foreign policy in the first place.¹³⁸ As Scheffer stated, "Complementarity is not a complete answer, to the extent that it involves compelling states (particularly those not yet party to the treaty) to investigate the legality of humanitarian interventions or peacekeeping operations that they already regard as valid official actions to enforce international law."¹³⁹ In essence, the United States refused to accept the statute as long as it was bound by the statute.

F. *The Outcome*

On July 17, 1998, participating states adopted the statute by a landslide majority: 120 in favor, 7 opposed, and 21 abstaining.¹⁴⁰ Although the official vote was unrecorded (at the request of the United States),¹⁴¹ the opposition consisted of the United States, Israel, Iraq, China, Libya, Qatar, and Yemen.¹⁴² Paradoxically, fourteen NATO members signed the statute,¹⁴³ several of whom remain the closest allies of the United States on military and peacekeeping fronts. To date, twenty-nine countries have ratified the statute,¹⁴⁴ including two major Western European powers.¹⁴⁵ France amended its constitution and ratified the statute on June 8,

135. See Brown, *supra* note 3, at 880-81.

136. See *id.*

137. See Roth, *supra* note 4.

138. See Scheffer, *supra* note 119, at 19.

139. *Id.*

140. See *Permanent War Crimes Court Approved*, *supra* note 1.

141. See David, *supra* note 38, at 354.

142. See Lobe, *supra* note 5.

143. See *id.*

144. See *Rome Statute of the International Criminal Court: Ratification Status* (last modified Apr. 30, 2001) <<http://www.un.org/law/icc/statute/status.htm>>.

145. See *id.*

2000, followed by Germany, which ratified it on December 11, 2000.¹⁴⁶ Once sixty nations have ratified the statute, the ICC will exist in an official form.

G. *The Aftermath*

Upon the return of the delegation from Rome, and amid harsh criticism from the world press, the State Department continued to frame the Court as an impossibility in light of the current global structure.¹⁴⁷ Placing legal and political issues hand in hand, Scheffer stated, "We could not bargain away our security or our faith in basic principles of international law."¹⁴⁸ Appearing before the Senate, he reiterated the principle legal conflicts concerning the Court's prosecutor, the jurisdiction of non-party states, and the opt-out provision.¹⁴⁹ He stated that the Court could hold profound implications for U.S. peacekeeping efforts and could also subject the United States to politically motivated attacks even if it did not ratify the treaty.¹⁵⁰

In response to Scheffer's remarks, several senators expressed not only their relief over the rejection of the statute,¹⁵¹ but further condemned the Court, calling it "a monster that must be slain."¹⁵² Furthermore, some call the Court patently unconstitutional because it would subject citizens to judicial power without the fundamental protections of the Constitution.¹⁵³

In the following year, the United States weighed its options. On the one hand it continued to participate in the post-conference Prepcom meetings,¹⁵⁴ but simultaneously the United States considered its ability to pressure its allies¹⁵⁵ on the issue and began to renegotiate its Status of Forces agreements.¹⁵⁶ The legal and political debate resurfaced late in December 2000 as the final deadline for signing the ICC

146. See *France Amends Constitution to Ratify Creation of World Criminal Court*, AGENCE FRANCE-PRESSE, June 28, 1999, available in 1999 WL 2629160.

147. See *ICC Hearings*, *supra* note 7.

148. Scheffer, *supra* note 119, at 17.

149. See *ICC Hearings*, *supra* note 7.

150. See *id.*

151. See *ICC Hearings*, *supra* note 7 (statement of Senator Jesse Helms).

152. *Id.* (statement of Senator Rod Grams).

153. See *id.* (statements of Senator John Ashcroft).

154. See Scheffer, *supra* note 119, at 21.

155. See Orentlicher, *supra* note 133.

156. See *id.*

statute approached. In a surprising move, President Clinton authorized Scheffer to sign the statute on December 31, 2000, the last day of eligibility. As the United States is now a signatory state, the debate turns to the prospects for ratification by the Senate, a process required for any such international treaty.

III. IDENTIFICATION OF THE PROBLEM

The United States can take three stances with regard to the ICC. First, it can support the Court and gain more influence through active participation. Second, it can ignore the Court to the best of its ability and maneuver within the status quo. Third, it can actively oppose the Court. In light of the objections raised by the United States, the second stance seems particularly impractical and therefore unlikely. If and when sixty nations ratify the statute, the United States will have to deal with the matter in one way or another.

Therefore, this comment seeks to address the problem of whether the United States should ratify the statute for the International Criminal Court. However, a determinative sub-issue is how the United States can strike a balance between its interests and those of the international community as a whole. In other words, can the United States reconcile its substantive objections and concerns over sovereignty with its desire to support the basic goals and principles upon which the Court rests?

IV. ANALYSIS

American participation in the ICC carries particular importance to the international community. First and most obvious, it will effect the operation of the Court.¹⁵⁷ Although the ICC could subsist without the participation of the United States, few would deny that its participation would serve as a large benefit, both symbolically and economically.¹⁵⁸ Second, the decision will affect both the perception and treatment of the United States under international law.¹⁵⁹ Concurrently, the ICC could influence American foreign policy in terms of

157. See Brown, *supra* note 3, at 891.

158. See Scheffer, *supra* note 44 (regarding the economic support given the ICTY and ICTR).

159. See ICC Hearings, *supra* note 7 (in reference to Scheffer's remarks about the future for the United States in international law).

humanitarian and peacekeeping activities as well as its foreign relations with other states.¹⁶⁰ Last, and perhaps most importantly, the United States's decision will speak volumes about the overall legitimacy of international law and its ability to enforce individual obligations to respect human rights.¹⁶¹

A. *Legal Claims*

1. *The Definition of Aggression*

The current definition of aggression does not significantly threaten American interests. Although the United States may disagree with the inclusion of the crime in the statute, its practical negative potential is mitigated because any definition must comport with the terms of the United Nations Charter.¹⁶² Since the Charter gives the Security Council the right to determine the act of aggression, the Council ultimately decides whether to prosecute under the crime.¹⁶³

Since the United States has a permanent member status on the Council, it should not fear the amendment process. Instead, it should seek clarification surrounding the ability of states to remove themselves from the jurisdiction of the crime once the body passes an amendment.¹⁶⁴ The United States would like the same option if it does not ratify the statute by the time signatory states vote upon a definition of aggression.

2. *The Power of the Prosecutor*

The United States feared that its leaders or soldiers could be subject to baseless attacks by either a prosecutor with a political agenda or by an enemy state which could manipulate the court.¹⁶⁵ However, because negotiators included so many safeguards to placate the American delegation, this is an unlikely scenario.¹⁶⁶ Strict definitions within the statute itself constitute the first line of defense by

160. See *id.*

161. See David, *supra* note 38, at 408 (considering the negative implications of the recent U.S. decisions).

162. See *Rome Statute of the International Criminal Court: Some Questions and Answers* (Oct. 1998) <<http://un.org/law/icc/statute/iccq&a.htm>>.

163. See *id.*

164. See Brown, *supra* note 3, at 867-68.

165. See O'Connor, *supra* note 2, at 954-55.

166. See Brown, *supra* note 3, at 880.

dictating that the Court will prosecute only the most serious of international crimes.¹⁶⁷

Second, and most important, complementarity will protect the United States because the statute affords a state adequate notice before the prosecutor investigates any of its citizens.¹⁶⁸ Thus, the state can eliminate the prosecutor's involvement by conducting its own investigations.¹⁶⁹

Third, the prosecutor must pass extensive judicial tests in order to truly begin prosecution of an individual. This includes convincing a judicial oversight panel, whose consent is crucial to beginning an investigation.¹⁷⁰ If the panel agrees, the prosecutor must then gather evidence and convince a second panel that sufficient grounds exist for prosecution and jurisdiction.¹⁷¹ Then, if officials bring a suspect into custody, the prosecutor must pass judicial scrutiny a third time and convince a panel that the prosecution is substantiated.¹⁷²

The power of the Security Council to delay any proceedings for at least a year presents the fourth safeguard against a rogue prosecutor.¹⁷³ Although the motion must pass by a majority vote of the entire fifteen member Council,¹⁷⁴ it seems fairly certain that the United States could use its influence to table any investigation with which it disagreed.¹⁷⁵

3. *Jurisdiction over Non-Party States*

Although the United States might have practical concerns over the ability of the Court to prosecute its nationals if it abstains from or delays ratification, it offers tenuous legal arguments at best.¹⁷⁶ First, the United States is mistaken in its assertion that the statute would bind non-party states in violation of international law.¹⁷⁷ The Court does not claim jurisdiction over states, but individuals,¹⁷⁸

167. *See id.*

168. *See id.*

169. *See id.* at 881.

170. *See id.*

171. *See id.* at 880.

172. *See Brown, supra* note 3, at 880.

173. *See O'Connor, supra* note 2, at 966.

174. *See id.* (commenting on the pivotal power of the Security Council).

175. *See id.* at 967.

176. *See Diane F. Orentlicher, Politics by Other Means, The Law of the International Criminal Court*, 32 CORNELL INT'L L.J. 489 (1999).

177. *See id.* at 491.

178. *See id.*

abiding expressly by the precedents the United States supported at Nuremberg.¹⁷⁹ The statute would impose obligations upon parties such as payment of dues, the procurement of pertinent evidence, and extradition of an accused individual.¹⁸⁰ These conditions would not, however, apply to non-party states.¹⁸¹

While the Court may prosecute U.S. nationals even if it withholds ratification, this does not represent a great departure from the manner in which international crimes are currently handled.¹⁸² The international community considers the crimes over which the Court has subject-matter jurisdiction as grave breaches of international law, legitimizing prosecution under the jurisdiction of any interested state.¹⁸³ The only difference is that the ICC, as opposed to state courts, will try the individual. Because the Court applies strict due process standards (for which the United States itself lobbied), individuals will enjoy enhanced due process rights and may receive greater protection than in many state jurisdictions.¹⁸⁴

The demand by the United States to link the jurisdiction of the Court only to instances where the concerned state was a party to the statute would prove far too limiting.¹⁸⁵ In this case, any state that foresaw itself committing war crimes could escape liability by simply withholding its acceptance of the statute.¹⁸⁶ This scenario would unacceptably cripple the Court, especially as negotiators already limited its jurisdiction as a concession to appease the American delegation.¹⁸⁷

B. *Political Claims Based on Sovereignty*

The apparent desire to have an unconditional veto over the International Criminal Court raises serious questions about the agenda of the United States at Rome as well as its commitment to the most basic principles of international

179. See King & Theofrastous, *supra* note 15, at 82.

180. See Orentlicher, *supra* note 176, at 491.

181. See *id.*

182. See Roth, *supra* note 4.

183. See *id.*

184. See discussion *supra* Part II.D.

185. See Roth, *supra* note 4.

186. See *id.*

187. See *id.*

humanitarian law.¹⁸⁸ Although the United States clearly has the right to care for its own interests at home and abroad, its attempt at absolute sovereignty is flawed in theory and practice.

A time existed when every state was accountable only to itself, but in an increasingly globalized and interdependent world, that time has long since passed.¹⁸⁹ Repeatedly over the past fifty years, the United States has espoused the virtues of international law, from its role in the criminal tribunals of Nuremberg, Yugoslavia, and Rwanda,¹⁹⁰ to its participation in the various United Nations conventions defining the substance of the law that fuels the ICC statute.¹⁹¹ In the wake of the Rome Conference, it appears as if the United States favors international justice, as long as it enjoys exemption from its reach.¹⁹²

This approach seems so out of step with contemporary practice that one must wonder whether the United States suffers from poor diplomatic coordination rather than flawed foreign policy. For example, the United States recently accepted the jurisdiction of the Yugoslav Tribunal over alleged crimes committed by a soldier involved with its peacekeeping operations¹⁹³—a clear contradiction to its demand for reassurances of immunity from the ICC.¹⁹⁴ The solution to this policy conundrum remains unclear, and although the United States made a strong symbolic statement by signing the statute, its continued legal objections hold little validity in the international community.

V. PROPOSAL

The United States has attempted to frame its opposition to the International Criminal Court in legalistic terms, but once examined, these objections appear unsubstantiated. The concerns expressed by the American delegation at Rome with regards to jurisdiction of non-parties lack merit.¹⁹⁵ Additionally, the fears of politically-based claims seem

188. See David, *supra* note 38, at 408.

189. See *A World Court for Criminals*, *supra* note 134.

190. See *supra* text accompanying notes 34, 37.

191. See Brown, *supra* note 3, at 855.

192. See *Burden of Proof*, *supra* note 41.

193. See *id.*

194. See *id.*

195. See Orentlicher, *supra* note 176, at 491.

exaggerated when compared to the force of the complementarity principle, the additional safeguards afforded by the procedure of the Court, and the special power given to the Security Council.

These concessions and any future substantive changes which may occur while the statutory refining process continues will only go so far towards placating state leaders. Before the United States takes any formal action, whether supportive or in opposition to the Court, it must resolve the internal conflict existing between the popular conception of sovereignty and the increasingly important role the country plays in the globalized world. This conflict is not inherent, as some political leaders have suggested,¹⁹⁶ but due largely to the widely-held belief that sovereignty is an exclusionary device which protects states from alien influences.¹⁹⁷ However, even as the international community breaks into an increasing number of separate state actors,¹⁹⁸ exclusionary and isolationist barriers continue to weaken, rather than prosper. This process of increased interdependence suggests not the demise of national sovereignty, but instead, that the concept can function in more than one manner. If sovereignty allows a state to protect itself from international and supra-national forces, then conversely, sovereignty also gives a state the right to participate in such forces.¹⁹⁹ In this sense, the principle of sovereignty contributes to, rather than detracts from, the international system. Understanding sovereignty as being more than a defensive mechanism will go a long way towards shifting the discussion surrounding the Court away from political posturing, and towards a meaningful debate which better addresses practical concerns and national interests.

Although the United States may still find that its interests outweigh that of an international court, its justification for such a finding will not stem from modern international law. In light of the weakness of its substantive arguments, there seems little to proffer in remaining a

196. See *supra* notes 151-153 and accompanying text.

197. See Brian Havel, *The Constitution in an Era of Supranational Adjudication*, 78 N.C. L. REV. 257, 327 (2000).

198. See *id.* ("The reported demise of the nation-state, for example, has not occurred. On the contrary, the global club of sovereigns has almost doubled since the founding of the United Nations.").

199. See *id.* at 328.

renegade from the Court.²⁰⁰ The United States should become actively involved with all further proceedings related to the International Criminal Court. Participation will not guarantee ratification, but it will allow the United States to address its concerns from a position of strength rather than impunity.²⁰¹

While working to refine the structure of the Court to better address its concerns, the United States should subsequently begin a dialogue in an attempt to answer lingering questions concerning the constitutionality of the Court and its potential relationship to domestic law. Absent a rigorous discussion to reveal the complexities of these legal issues, any ratification procedure would be woefully inadequate.

VI. CONCLUSION

As the second century of international law begins, the global community stands at a unique position in human history. For the first time, a truly supra-national organization to maintain peace and security will exist that reflects vital legal and customary beliefs over which virtually all nations agree. It is only fitting that the most powerful nation in the world takes a primary role in creating a court that can accomplish its objectives with fairness and effectiveness. Although the Court is not perfect, the United States should recognize that existing problems serve as a justification for participation, rather than as bases for rejection.

200. See King & Theofrastous, *supra* note 15, at 104-05.

201. See *id.*
